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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN GRACIAN FIGUEROA,

Defendant and Appellant.

E069390

(Super.Ct.No. RIF10002612)

OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., and Patrick F. Magers,\* Judges. Affirmed with directions.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

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\* Retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant John Figueroa guilty of first degree burglary. (Pen. Code<sup>1</sup>, § 459.) Defendant admitted the allegations that he had suffered one prior prison term (§ 667.5, subd. (b)), had two prior serious felony convictions (§ 667, subd. (a)), and had two prior strike convictions (§§ 667, subds. (c) & (e), 1170.12, subd. (c)(2)(a)). A trial court subsequently struck the prior prison conviction, which was for a conviction that is now a misdemeanor. At sentencing, the court dismissed one of the prior strike convictions, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It then sentenced defendant to four years, doubled pursuant to the remaining prior strike, plus five years on both of the prior serious felony enhancements, for a total term of 18 years in state prison.

On appeal, defendant contends that: (1) the court erred in denying a motion to dismiss his burglary charge, which was based on a denial of his right to a speedy trial; and (2) the sentencing minute order and abstract of judgment should be corrected, since they reflect fees and fines that were not actually imposed. The People concede, and we agree, that the minute order and abstract of judgment should be corrected. We

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

also remand the matter for resentencing pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393). Otherwise, we affirm the judgment.

### FACTUAL BACKGROUND

On January 11, 2010, the victim left his house at 5:00 a.m. to go to work. When he returned that evening, he noticed that his front door was ajar. When he went inside, he observed that the cable box, television, and a cell phone were missing. He called the police.

A police officer responded to the call to investigate. She looked around the victim’s house and found that, in the office area, the window was open and the screen was missing. She found the screen on the ground, behind a bush. The officer also noticed fresh pry marks on the front door. The officer dusted the exterior of the window for fingerprints, since she noticed handprint marks on the window. She also dusted the exterior of the door for fingerprints. She was able to lift fresh prints from the window and the front door. The prints came back for a match with defendant. A warrant was issued for his arrest.

The trial was held on September 21, 2017. The responding officer testified that she vaguely recalled the investigation of the victim’s home. She reviewed the report she had written in 2010 to refresh her memory for her testimony. She testified that she lifted prints at the crime scene and submitted them into evidence.

A fingerprint examiner also testified. She said the case was originally submitted in 2010, and the two original examiners that worked on this case had retired.

Thus, the prints were resubmitted and compared to the findings from the original case. The fingerprints and palm prints were analyzed, and they matched defendant's prints.

## ANALYSIS

### I. The Trial Court Properly Denied Defendant's Motion to Dismiss on Speedy Trial Grounds

Defendant contends the trial court erred in denying his motion to dismiss, which alleged that the six-year delay between the filing of the complaint against him and the arraignment violated his state constitutional right to a speedy trial. The People argue the court properly denied the motion, since defendant failed to demonstrate he suffered any prejudice from the delay. We find no error.

#### *A. Procedural Background*

The burglary at the victim's home occurred on January 11, 2010. On June 8, 2010, the Riverside County District Attorney filed a felony complaint charging defendant with burglary. At that time, a warrant was issued for defendant's arrest and an order was filed for defendant to appear in court on the pending charge and to submit to finger printing prior to June 18, 2010. Defendant failed to appear.<sup>2</sup>

On June 22, 2016, defendant was in custody. He was arraigned on the complaint the following day by video. He pled not guilty and denied the prior convictions.

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<sup>2</sup> This information is taken from the People's opposition to defendant's motion to dismiss for denial of speedy trial.

The court held a preliminary hearing on September 2, 2016. It found sufficient evidence to hold defendant to answer.

On September 15, 2016, the district attorney filed an information, charging defendant with one count of first degree burglary (§ 459) and alleging that he had suffered one prior prison term (§ 667.5, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)), and two prior strike convictions (§§ 667, subds. (c) & (e), 1170.12, subd. (c)(2)(a)).

On December 23, 2016, defendant filed a motion to dismiss, claiming that he was prejudiced by the six-year delay from the time of the filing of the complaint and his arraignment, in violation of his right to a speedy trial under the California Constitution. He contended he was prejudiced by the delay due to the passage of time and the loss of memory, and that he was thereby “inhibited from presenting as sound a defense to the charges against him as he otherwise could have.” In support of his motion, defendant attached a declaration stating his residence address where he had lived since 1987, stating that the DMV had his address, stating that he was on parole until 2009, and asserting that he had no independent recollection of his whereabouts on the date of the alleged incident.

The People filed an opposition to defendant’s motion, arguing that defendant’s explanation that his memory inhibited him from presenting a sound defense since he did not recall his whereabouts on the day in question was inadequate proof of actual prejudice. The People further contended that even if defendant showed prejudice, the delay was justified. The People explained that a warrant was issued for defendant’s

arrest, and he was noticed to appear in court at the same address he claimed to have resided in since 1987. Also, the court sent a notice, informing defendant that a complaint was filed against him and ordering him to appear in court to submit fingerprints. The People asserted that the reason for the delay was defendant's own unavailability and disregard of the mailed notices.

The court held a hearing on the motion. Defense counsel argued that defendant's memory was lost on where he would have been on the day of the burglary and the reason his fingerprints would have been at the victim's house. She then speculated, "Was he doing work there? Was he in that area on that day? No one can remember what they did on a specific date six years ago, unless it was something significant." She argued his loss of memory significantly prejudiced him in aiding his defense. When the court asked if the loss of memory was due to a mental defect or mental illness, defense counsel said, "No. It would be a regular loss of an average regular person's lack of memory." The court stated that, in applying the case law from *People v. Martinez* (2000) 22 Cal.4th 750 (*Martinez*), it found that defendant's declaration was insufficient to establish actual prejudice. It then denied defendant's motion.

*B. Defendant Failed to Demonstrate That the Delay Caused Actual Prejudice*

"Article I, section 15 of the California Constitution provides, in pertinent part: 'The defendant in a criminal cause has the right to a speedy public trial . . .' The right attaches in a felony prosecution upon the filing of the complaint. [Citation.] When a defendant complains that this right has been violated because of an unreasonable delay

between the filing of the complaint and his/her subsequent arrest, the defendant must first establish prejudice as a result thereof. If defendant makes an adequate showing in that regard, the burden shifts to the People to justify the delay after which the court must balance the harm to defendant against the reasons for the delay in deciding whether dismissal of the prosecution is warranted.” (*Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 945 (*Shleffar*).) “As the threshold question of whether a defendant has established prejudice occasioned by the delay is clearly a factual matter to be resolved by the trial court, its decision on that point will not be overturned by an appellate court if supported by substantial evidence.” (*Ibid.*)

In *Martinez, supra*, 22 Cal.4th 750, the defendant was arrested for driving under the influence (DUI). A felony complaint was filed and an arraignment notice was sent. The defendant failed to appear, and a magistrate issued an arrest warrant. Almost four years later, the defendant was arrested on another matter, and the outstanding warrant was discovered. An information was filed, and the defendant moved to dismiss the charge for denial of her constitutional rights to a speedy trial. (*Id.* at p. 756.) A trial court conducted a hearing on the defendant’s motion. At this hearing, the parties presented evidence on the issues of prejudice resulting from the delay and justification for the delay. Testifying on her own behalf, the defendant denied any memory of the September 1991 DUI arrest or of what she had done on that day. She said she had never lived at the address where the arraignment notice was sent, and had never told anyone she lived there. (*Id.* at p. 757.) The trial court concluded that the defendant failed to carry her burden of demonstrating that the four-year delay in bringing her to

trial had prejudiced her ability to defend against the charge. Accordingly, the court denied the motion to dismiss. (*Ibid.*) The Court of Appeal affirmed, stating: “ ‘[Defendant] did not meet her burden of showing that she suffered actual prejudice from the prosecutorial delay. She merely speculates that the testimony of the two unavailable prosecution witnesses would have aided her defense. Accordingly, substantial evidence supports the trial court’s finding that [the defendant] suffered no actual prejudice from the delay, and the court did not err by denying her motion to dismiss.’ ” (*Id.* at pp. 757-758.) The Supreme Court affirmed the judgment. (*Id.* at p. 770.) In doing so, it stated that “[n]o presumption of prejudice arises from delay after the filing of the complaint and before arrest or formal accusation by indictment or information [citation]; rather, the defendant seeking dismissal must affirmatively demonstrate prejudice [citation].” (*Id.* at p. 767.)

In *Serna v. Superior Court* (1985) 40 Cal.3d 239 (*Serna*), the defendant sought dismissal of a misdemeanor embezzlement prosecution on grounds that a more than four-year delay between the filing of the complaint and his arrest denied his state and federal constitutional rights to a speedy trial. When the municipal court denied his motion to dismiss, he sought a writ of mandate in the superior court to compel the municipal court to grant the motion. When the superior court denied his writ, he sought further review in the Supreme Court. (*Id.* at p. 245.) The defendant submitted a declaration, stating among other things, that he “had no independent recollection of his activities on” the day of the incident, that potential witnesses existed but he did not



know their names or whereabouts, and that he had been available for service of process at all times. (*Id.* at p. 247.)

To the extent the denial of the motion to dismiss was based on a conclusion that he had not demonstrated a violation of the state constitutional right to speedy trial, the Supreme Court found no error. (*Serna, supra*, 40 Cal.3d at pp. 250-251.) The Supreme Court stated: “Although a lengthy delay, such as that which occurred here, may permit an inference of prejudice since memories fade and witnesses disappear, this is not invariably so. We look therefore to determine whether the accused has demonstrated actual prejudice from a prearrest delay.” (*Id.* at p. 250.) The court specifically concluded that the defendant’s declaration was insufficient to support a finding of prejudice, since it “reflected no effort whatsoever by petitioner to refresh recollection and omitted any reference to the incident underlying the charge as described in the police reports.” (*Id.* at p. 250.) The court noted that if the defendant was the suspect described in the police reports, “a court could properly conclude that the minimal effort of reading the reports in an attempt to refresh his memory would not be an unreasonable burden. If he is not the suspect, the court could expect at least an assertion that he had no recall of, or had not been employed at, the gasoline station at which the embezzlement allegedly occurred.” (*Ibid.*)

The *Serna* court further stated that a court “need not accept a conclusory statement that the lack of recall demonstrates prejudice where no effort has been made to ascertain the basis for the charge. Lack of recall may establish prejudice, but only

on a showing that the memory loss persists after reasonable attempts to refresh recollection.” (*Serna, supra*, 40 Cal.3d at p. 250.)

In *Shleffar, supra*, 178 Cal.App.3d 937, the defendant allegedly stole and cashed several checks made out to her employer. A felony complaint was filed, and she was arrested 27 months later. (*Id.* at pp. 940-941.) Defendant filed a motion to dismiss, alleging that the delay prejudiced her ability to defend against the charge. She primarily pointed to her purported inability to locate the man who had often accompanied her to the liquor store where she cashed checks. She also contended that the memories of the two witnesses the People had presented at the preliminary hearing had dimmed, due to the passage of time. (*Id.* at p. 942.) The trial court denied her motion, and the appellate court affirmed. The appellate court stated that “[t]he purpose of the constitutional speedy trial provision is to insure timely prosecutions and to prevent unjustified delays from inhibiting the sound presentation of a defense. But unless a defendant can demonstrate specific prejudice flowing from the delay, the draconian remedy of dismissal should not be invoked merely because the accused was not arrested as quickly as would be possible in the best of all worlds.” (*Id.* at p. 946.) The court also noted that the “defendant never presented to the trial court, either by way of declaration, testimony, or in-camera hearing, a specific theory of defense.” (*Ibid.*)

Here, defendant argues that the court abused its discretion by finding his declaration that he had no memory of the date of the offense did not establish prejudice. He claims that his declaration was prima facie evidence of prejudice, which

triggered the requirement that the government justify the delay in prosecuting his case. However, “[n]o presumption of prejudice arises from delay after the filing of the complaint and before arrest or formal accusation by indictment or information.” (*Martinez, supra*, 22 Cal.4th at p. 767.) Furthermore, defendant did not present a specific theory of defense or establish a particular factual context in which his claim of prejudice could be evaluated. (*Shleffar, supra*, 178 Cal.App.3d at pp. 945-946.) Rather, he simply declared, “I have no independent recollection of my whereabouts on the date of [the] alleged incident.” At the hearing, defense counsel merely argued that defendant was prejudiced since he could not remember where he would have been on that day or the reason his fingerprints were found at the victim’s house. She then queried, “Was he doing work there? Was he in that area on that day?” However, “speculation about prejudice because potential witnesses’ memories have failed or because witnesses and evidence are now unavailable is insufficient to discharge defendant’s burden.” (*Shleffar, supra*, 178 Cal.App.3d at p. 946.) Thus, defendant’s declaration was insufficient to meet his burden of showing he suffered actual prejudice.

Defendant attempts to distinguish *Shleffar* by stating that the defendant in that case “did not claim *her own memory* was faded, as [he] did here.” He then argues his claim that he personally had no independent recollection of the day of the burglary “was not speculation, but a fact asserted under penalty of perjury.” However, his claim was speculative. (*People v. Morris* (1988) 46 Cal.3d 1, 38, disapproved on other

grounds as stated in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5, [“[d]efendant’s claim that his own memory had faded was speculative at best.”].)

Moreover, we “need not accept a conclusory statement that the lack of recall demonstrates prejudice where no effort has been made to ascertain the basis for the charge. Lack of recall may establish prejudice, but only on a showing that the memory loss persists after reasonable attempts to refresh recollection.” (*Serna, supra*, 40 Cal.3d at p. 250.) There was no assertion that defendant made the minimal effort of reading the police reports in an attempt to refresh his memory, or even an assertion that he had no recall of the house where the burglary occurred. (See *Ibid.*) Defendant’s bare declaration was insufficient to support a finding of prejudice since it “reflected no effort whatsoever . . . to refresh recollection.” (*Ibid.*)

Because defendant failed to demonstrate specific prejudice as a result of the delay, we conclude that the court did not abuse its discretion in denying his motion to dismiss. (*Shleffar, supra*, 178 Cal.App.3d at p. 946.)

## II. The Sentencing Minute Order and Abstract of Judgment Should Be Corrected

Defendant contends that several fines and fees listed in the sentencing minute order and abstract of judgment should be corrected to reflect what the court actually imposed at sentencing. The People concede, and we agree.

“Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) “The clerk cannot supplement

the judgment the court actually pronounced by adding a provision to the minute order . . . .” (*Id.* at p. 387.)

At sentencing, the court imposed a restitution fine of \$400. However, the minute order and abstract of judgment (abstract) reflect that restitution fines under sections 1202.4, subdivision (b), and 1202.45 were imposed in the amount of \$10,000. As defendant correctly notes, the minute order and abstract should be corrected to reflect the imposition of the \$400 restitution fine actually imposed by the court.

The sentencing minute order and abstract also reflect the imposition of a \$1,500 fee for presentence incarceration costs, pursuant to section 1203.1c. However, the court did not impose such a fee. Moreover, section 1203.1c applies only to defendants sentenced to local custody. (§ 1203.1c, subd. (a).) Thus, the minute order and abstract should be corrected to remove this \$1,500 fee.

In addition, the minute order and abstract reflect that the court imposed a booking fee of \$514.58, pursuant to Government Code section 29550. However, as defendant and the People agree, the court did not impose this fee; thus, the minute order and abstract should be corrected.

Finally, the minute order and abstract reflect that the court ordered defendant to participate in a counseling or education program having a substance abuse component, pursuant to section 1203.096. However, the court did not make this order, and the parties agree that such order should be stricken from the minute order.

### III. The Matter is Remanded for Resentencing

On September 30, 2018, the Governor signed SB 1393 which, effective January 1, 2019, amends sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) After our original opinion in this case was filed on January 28, 2019, defendant petitioned for rehearing claiming that, in light of SB 1393, the matter should be remanded for resentencing, so the trial court may exercise its discretion to dismiss or strike the five-year consecutive terms that were imposed based on his two prior serious felony convictions. (§ 667, subd. (a).) We granted defendant’s petition for rehearing and vacated our prior opinion. We now remand the matter for resentencing.

Defendant claims SB 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction was not final when SB 1393 became effective on January 1, 2019. The People filed a supplemental brief and conceded that the matter should be remanded for sentencing. We agree. (*Garcia, supra*, 28 Cal.App.5th at pp. 971-973.)

### DISPOSITION

The matter is remanded to the trial court with directions to resentence defendant, pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill 1393. In addition, the superior court clerk is directed to

generate a new minute order reflecting that the October 25, 2017 minute order incorrectly states that the court imposed restitution fines under Penal Code sections 1202.4, subdivision (b), and 1202.45 in the amount of \$10,000; a \$1,500 fee for presentence incarceration costs pursuant to Penal Code section 1203.1c; a booking fee of \$514.58 pursuant to Government Code section 29550; and substance abuse counseling under Penal Code section 1203.096. The new minute order should also reflect that the court imposed a restitution fee of \$400. The clerk is further directed to amend the abstract of judgment to reflect these corrections and to forward a copy of the new minute order and abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

RAPHAEL  
J.